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FILE: LIN 04 088 52255 Office: NEBRASKA SERVICE CENTER Date: AUG 12 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

3 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consultancy and development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits copies of an audited financial statement and pay stubs.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 22, 2002. The proffered wage as stated on the Form ETA 750 is \$63,054 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have been working for the petitioner since December 2003. (The Form ETA 750 was originally filed on behalf of another alien; the present beneficiary was later substituted.)

On the petition, the petitioner claimed to have been established on March 29, 1999, to have a gross annual income of \$3.5 million, and to currently employ "35+" workers. Under "Net Annual Income," the petitioner wrote "n/a." The petitioner did not explain why the reference to net annual income is supposedly not applicable. In support of the petition, the petitioner submitted Form 1120 Corporate tax returns for the petitioner for calendar year 2002. The tax return reflects the following information:

Gross receipts or sales	\$1,250,984	Cash	(\$10,943)
Net income (loss)	(96,942)	Other current assets	39,074
Compensation of officers	23,589	Current liabilities	26,271
Salaries and wages	674,453		

The petitioner also submits an unaudited balance sheet for 2003, showing the following information:

Current assets	\$781,584
Current year Income	284,405
Current liabilities	562,258

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 23, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested "all tax returns for 2003." In response, counsel cites "a series of cases which establish that a petitioner has ability to pay the employee despite loss shown on income tax return." The cited cases are unpublished, non-precedent appellate decisions. From the descriptions provided, the cited decisions do not appear closely to parallel the present proceeding.

It is true that, under some circumstances, losses shown on a tax return do not automatically prove that the petitioner is unable to pay the proffered wage. That being said, it cannot suffice for the petitioner simply to make this observation. The petitioner must demonstrate that, in this particular instance, it actually had the funds available to pay the proffered wage.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), which, counsel states, allows consideration for "uncharacteristically unprofitable or difficult years." *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The burden is on the petitioner to establish that 2002 was, in fact, "uncharacteristically unprofitable or difficult" for the company. In the present proceeding, the petitioner had been in business for less than three and a half years, and has provided no evidence to show that 2002 was an unusual aberration in an otherwise profitable history of the company. Without such evidence, the comparison to *Sonogawa* is not persuasive. *Sonogawa* is not simply a mechanism by which unprofitable businesses may avoid the regulatory requirement that they establish ability to pay.

The petitioner submits a copy of an auditor's report for calendar years 2001 and 2002. The report contains the following information:

	2001	2002
Current Assets	\$146,855	\$244,661
Current Liabilities	116,973	157,680
Cash and Cash Equivalents	(9,542)	(10,943)
Income	[not provided]	1,336,196
Payroll Expenses	"	702,242
Total Expenses	"	1,374,106
Net Loss before Income Taxes	"	(37,910)
Net Loss after Income Taxes	"	(27,996)

The figures shown on the 2002 audited statement do not entirely agree with the figures on the 2002 tax return. For instance, the "current assets" figures differ by roughly a factor of six (a factor of eight if we subtract the negative cash balance from the current assets shown on the tax return).

The petitioner's 2003 tax return shows the following information:

Gross receipts or sales	\$2,527,079	Salaries and wages	\$76,588
Cost of goods sold	2,186,818	Cost of labor	1,099,018
Total income	340,261	Cash	(1)
Taxable income	(279,347)	Other current assets	17,208
Compensation of officers	60,215		

An unaudited balance sheet for 2003 shows that, as in previous years, the petitioner ended 2003 with a negative cash balance in the tens of thousands of dollars.

Quarterly tax filings for 2003 indicate that the petitioner paid \$235,522.75, \$367,983.32, \$387,848.86, and \$543,256.79, respectively, during the four quarters of that year. The line marked "Number of Employees" is blank on each of these returns. Each of these amounts substantially exceeds the total "salaries and wages" reported on the tax return for that same year. The combined annual total, \$1,534,611.72, substantially exceeds the aggregate amounts claimed as "compensation of officers," "salaries and wages" and "cost of labor" on the 2003 tax return.

The petitioner also submits copies of pay stubs, showing that the petitioner paid the beneficiary \$4,238.23 over the course of four weeks in April 2004. As of April 30, 2004, the beneficiary's "Gross Pay Year To Date" was \$22,307.60, roughly equivalent to 21 weeks' pay. Given the usual delay between completion of a pay period and the issuance of payment for that pay period, the "Year to Date" amount appears to constitute all, or nearly all, of the beneficiary's compensation since he joined the petitioning company in December 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition on June 22, 2004. The director observed that the petitioner claims to have over 35 employees, but paid only \$698,042 in salaries and officers' compensation in 2002, which averages less than \$20,000 per person.

On appeal, the petitioner submits a copy of an audited financial statement for calendar year 2003 and copies of the beneficiary's pay statements from mid-2004. Counsel states, without elaboration, that this evidence "clearly establishes that [the petitioner] had the ability to pay the wages." The 2004 pay statements do not, and cannot, establish that the petitioner has consistently been able to pay the beneficiary's full wage from August 2002 onward. The auditor's report contains the following information:

Income	\$2,893,139.67	Cash and Cash Equivalents	(\$43,387.78)
Cost of Services Sold	2,160,592.25	Net Income before taxes	172,358.47
Current Assets	606,164.39	Indirect Labor	183,863.80
Current Liabilities	442,023.98	Total Expenses	560,188.95

The statement of expenses does not include salaries or payroll (although there were modest "Payroll Processing" expenses). Instead, the report shows only \$183,863.80 in "Indirect Labor." The audited statement, on its face, does not indicate that the company had any employees at all; the phrase "Indirect

Labor” appears to imply that the petitioner relied on contract labor rather than on individuals directly employed by the petitioner. Also supporting this conclusion is the very low “salaries and wages” figure listed on the 2003 tax return, and the complete absence of itemized salary expenses on the auditor’s report. Contractors are not “employed” by the petitioning company, and the petitioner cannot petition on behalf of contract workers.

The petitioner had previously submitted quarterly tax returns purporting to show that the petitioner paid its workers \$1,534,611.72 during 2003. The newly submitted auditor’s report indicates that the petitioner’s *total* expenses for 2003 were barely one-third of that amount. The line item for “Cost of Services Sold” includes no itemized breakdown. On the tax return, the “Cost of Labor” was only about half the total “Cost of Goods Sold.” The figures on the auditor’s report do not match the figures in the tax return that covers exactly the same period (i.e., calendar year 2003). These discrepancies make it very difficult to conclude how much the petitioner actually paid its workers in 2002 and 2003. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). Significant discrepancies between the petitioner’s tax returns and auditor’s reports cast doubt on the petitioner’s financial documentation. The petitioner has not explained how the tax returns and auditor’s reports can be equally accurate and equally reliable, when they report different figures.

The petitioner failed to submit consistent evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2002 or subsequently during 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Furthermore, the information on the petitioner’s financial documents, such as minimal “salaries and wages” and significant “costs of labor” and “costs of goods sold,” appear to be consistent with reliance on non-employee contract labor rather than on direct employees. Each new submission from the petitioner has raised more questions than it answered.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.